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PRELIMINARY DRAFT OF THE SERBIAN CIVIL CODE IN THE FIELD OF SURROGACY THROUGH THE LENS OF COMPARATIVE FAMILY LAW♣

Abstract

At the end of the year 2014, the Comission for Civil Law Codification and making the Serbian Civil Code has presented the text of the Preliminary Draft prepared for the public discussion concerning family law issues. This text has been awaited with much attention, especially after some innovative suggestions that have been made in the first version of the Preliminary Draft from 2011 which caused much turbulence in scientific community, particularly in the domain of family law where many radical changes have been announced. Somehow the idea of the draftmakers to regulate surrogacy for the first time has provoked many discussions and debates in the media.

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Unfortunatelly, the text of the Preliminary Draft from 2014 did not bring bigger improvement since many of the key issues regarding surrogacy have remained unsolved. Furthermore, some new alternatives were added to the text making the surrogacy picture from the Preliminary Draft even more complex and unclear.

In this paper, the author makes the effort to consider some of the suggested solutions from the Preliminary Draft in the light of comparative law, particularly concerning the types of surrogacy, parties to the surrogacy agreement and the modalities for establishing legal parenthood in the context of surrogacy.

Keywords: Preliminary Draft of the Serbian Civil Code, comparative law, surrogacy, the intended parents, surrogate mother, surrogate born child, legal parenthood.

1. Introduction

Continous rise of the medically assisted reproduction techniques has been taking place in the era of human rights posing a serious challenge to family legislators, especially in the domain of a parent-child relationship. With the development of the assisted reproduction technologies, the individual reproductive rights become more diverse in the context of participants who enjoys those rights as their right-holders, as well as legal and social consequences they produce.[1] That is why legal policy in this area is often followed by inconsistency, numerous controversies, even a kind of confusion. Those problems arise as a result of the intention to enable each and every person to exercise her/his individual reproductive rights which cannot be accomplished in some legal or social emptiness without interfering with the rights and interests of other right-holders and participants in legal relations. Thus, an aspiration to fulfill the right of one individual inevitably demands certain compromise at the expense of rights and interests of the others.

Family law is sometimes expected to be "a wishing well" where all interests and desires of various family members should be granted which can never be accomplished. Surrogacy is a good example of it. Designed as the last

[1] See: S. Bridge, Assisted Reproduction and the Legal Definition of Parentage, What is a Parent?, *A Socio-Legal Analysis* (eds. A. Bainham, S. Day Sclater and M. Richards), Hart Publishing, Oxford – Portland, 1999, p. 73.

opportunity for the infertile couples to have genetic off-spring of their own in cases of female partner's inability to carry a child, surrogacy has trigerred much more changes in the area of family law. The enforcement of the reproductive rights and freedoms causes particularly delicate consequences to relationships inside a family and especially to relationship between parents and children. Those relations are expressed primarily through the rules on affiliation (establishing legal parenthood) and then to whole series of the rights and obligations derived from the acquisition of legal parenthood. Simultaneously, with unchallenged applying of the non-discrimination principle, the scope of individuals empowered to enjoy the services of medically assisted reproduction has been constanly widening which leads to fragmentation of the concepts of motherhood and fatherhood often conflicting with the principle of the best interests of the child. Thus, thoughts about family as a fundamental society unit becomes just a fasade where the autonomy and freedom of choice for each individual make the basic value.[2] In such circumstances, family legislations are followed by frequent corrections and adjustments, even the radical changes and turnarounds in legal policy.

The typical example of turmoils and controversial tendencies inside family legislation represents the attitude toward the practice of surrogate motherhood by the creators of the Serbian legal policy. Thus, even before the enactment of the Law on Treatment of Infertility Using the Assisted Reproduction Techniques (2009) where the practice of surrogacy is explicitly forbidden and treated as a crime, the work on the Preliminary Draft of the Serbian Civil Code has started where the draftmakers have uphold the idea of surrogacy suggesting that this practice should be supported and legaly regulated in the future Civil Code.[3]

In the middle of 2011, the Comission for drafting the Serbian Civil Code presented the basic ideas in the context of surrogacy legal frame, or "giving birth for another", as the draftmakers named the service of surrogacy. This text faced with well-founded criticisms in the part of domestic legal theory because of

[2] See: M. Janjić-Komar, Porodična prava kao ljudska prava, *Anali Pravnog fakulteta u Beogradu*, br. 1–4/2001, p. 526.

[3] See: par. 56 (25) and par. 73. of the Law on Treatment of Infertility Using the Assisted Reproduction Techniques – LTIART, *Official Gazette of the Republic of Serbia*, No. 72/2009. On the other hand, Serbian goverment has made the Decision on the apointment of the special comission for Civil Law codification and making the Civil Code in the year 2006. See: *Official Gazette of the Republic of Serbia*, No. 104/06, 110/06 and 85/09.

certain inconsistencies and the lack of comprehensive comparative law solutions.[4] Despite of that, in the text of the Preliminary Draft prepared for the public discussion from 2014, those drawbacks and some problematic solutions have not been renounced. Furthermore, numerous dillemmas that the makers of Preliminary Draft had in the context of the way how surrogacy should be legally regulated have survived and the text of the Preliminary Draft still misses the clear direction which should be followed regarding the types of surrogacy services, modalities for establishing legal parenthood of the intended parents and the rights and obligations that may arise from the surrogacy agreement. From that reason, this paper will focus on some of the mentioned dillemas and solutions suggested by the makers of the Preliminary Draft from the aspect of comparative law.

2. Concept and types of surrogacy

2.1. Genetic and gestational surrogacy

Generally speaking, surrogacy is practice where one woman consents to carry out the pregnancy to the term with the intention to relinquish the child after birth to the couple or exceptionally to the individual (intended or commissioning parent or parent) who are designated by the contract as a child legal parents.[5] In legal theory and practice, there are various classifications of surrogacy and perhaps the most significant distinction is to genetic and gestational surrogacy. The key criterium for this distinction is existence of the genetic bond between a woman who gave birth for another (surrogate mother) and a child.[6] Genetic surrogacy is sometimes called traditional, low-technology or partial surrogation, while gestation surrogate motherhood is often named as high-technology or full surrogacy.[7]

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[4] For the detailed consideration of the solutions proposed by the version of the Civil Code (2011) see: G. Kovaček – Stanić, Biomedicinsko potpomognuto začeće i rođenje deteta: surogat materinstvo u uporednom evropskom pravu i Srbiji, *Stanovništvo*, br. 1/2013, p. 1–21.

[5] See: G. Kovaček – Stanić, *Porodično pravo: partnersko, dečje i starateljsko pravo*, Novi Sad, 2014, p. 38.

[6] See: K. Trimmings and P. Beaumont, General Report on Surrogacy, *International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 440.

[7] Genetic surrogation is called "traditional" because the oldest forms of this practice originate in ancient times where a woman was carrying and giving birth to a child genetically related to her and then handed over such newborn to the intended parents. This type of surrogacy

Thus, in case of genetic surrogacy surrogate mother is a woman who carries out pregnancy to the term and gives birth for another providing her own egg for the conception at the same time. On the other hand, in case of gestational surrogacy, surrogate mother carries a child who is not genetically related to her where the reproductive cells are provided by intended parents, one of them or donors (embryo donation). The latter form of surrogacy can hardly be justified since it completely diminish the aims of adoption and leads to conclusion about existence of "programmed child" practice which is incompatible with morality. This distinction is very important since the majority of commentators consider gestational surrogacy more acceptable having in mind the position of surrogate mother and her willingness to hand over the child.[8]

Thus, most of the countries that regulate surrogacy do not allow the service of genetic surrogacy.[9] On the other hand, legislations that permit such possibility (South Africa) usually have more restrictive and rigorous approach towards acquisition of legal parenthood by the intended parents (e.g. surrogate mother may change her mind about reluinquishing the child).[10]

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involves *in vivo* artificial insemination using the reproductive cells of the intended father as the oldest method of assisted reproduction which cannot compare to *in vitro* fertilisation in terms of expanses and material costs. See: N. A. Hatzis, Just the Oven: A Law & Economics Approach to Gestational Surrogacy Contracts, *Perspectives for the Unification and Harmonisation of Family Law in Europe* (ed. K. Boele – Woelki), Intersentia, Antwerpen – Oxford – New York, 2003, p. 415; K. Trimmings and P. Beaumont, *op. cit.*, p. 439 – 440.

[8] Some feminist scholars criticise preference for gestational surrogacy. Thus, it is considered that favouring gestational surrogacy only appears as paternalistic assumption that women who would choose to be genetic surrogates are not competent to make their own choice. J. Shapiro, For a feminist considering surrogacy, is compensation really the key question?, *Washington Law Review*, Vol. 89, 2014, p. 1361.

[9] For example the countries where the egg used in the process of surrogacy cannot belong to the surrogate mother are Greece, Russia, Israel. See: K. Rokas, National Reports on Surrogacy: Greece, *International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 145; O. Khazova, National Reports on Surrogacy: Russia, *International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 313; S. Shakargy, National Reports on Surrogacy; Israel, *International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 235.

[10] A surrogate mother who is also genetic parent of the child has the right to terminate the surrogacy agreement at any time prior to the lapse of 60 days after the birth of the child. M. Slabbert and C. Roodt, National Reports on Surrogacy: South Africa, *International Surrogacy*

In the Preliminary Draft of the Serbian Civil Code from 2011 it was left an open dillemma if the both types of surrogacy should be allowed. Unfortunatelly, this question has stayed virtually untouched in the latest version of the Preliminary Draft from the end of the year 2014.[11] Furthermore, the draftmakers consider that genetic surrogacy involves the cases where the reproductive cells (gametes) of at least one of the intended parents have been used for the child conception (fertilisation) which is confusing expression having in mind that the existence of genetic link between the surrogate mother and the child must be starting point in distinction between genetic and gestational surrogacy.[12] Thus, according to the Preliminary Draft, the practice of surrogacy where the egg for a surrogate mother is provided by a third woman as a donor should be considered as a genetic surrogacy, which is hardly acceptable.

In Serbian jurisprudence there are articulated attitudes advocating that only genetic surrogacy should be allowed at the moment as more restrictive solution comparing to the cases when surrogate mother is also genetic mother of a child.[13] Genetic surrogacy can hardly be adequate solution, especially in our social and traditional surrounding. This type of surrogacy is not supported by countries that have respectable tradition in exercising the service of surrogacy. Family Law of Serbia is highly devoted to the principle of genetic truth in relations between the family members so it is not likely that such form of surrogacy could be acceptable in our social environment. Most of the legal rules in the Serbian Family Law expresses importance of blood tie and necessity to have genetic and social parent in the same person.[14] Furthermore, if rules on genetic surrogacy

Arrangements: Legal Regulation at the International Level (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 329.

[11] See: Art. 63. of the Third Book of the Serbian Civil Code Preliminary Draft (2014).

[12] See: G. Kovaček – Stanić, *op. cit*., (2013), p. 14; J. Herring, *Medical Law and Ethics*, Oxford University Press, Oxford, 2008, p. 349; R. Cook, Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation, *What is a Parent? A Socio – Legal Analysis* (eds. A. Bainham, S. Day Sclater and M. Richards), Hart Publishing, Oxford – Portland, 1999, p. 124.

[13] See: G. Kovaček – Stanić, *op. cit*. (2013), p. 14.

[14] Typical example is the rule of Serbian Family Law where a putative father can contest legal parenthood of legally recognised father without need to prove that he was living with the mother of a child in certain period during her pregnancy or at the time of child's birth. He has only the duty to claim his own paternity in the same lawsuit so the child cannot be left

were adopted, more problematic issues would emerge, such as contact rights between surrogate mother and a child, which could lead to problems for sociological parents in exercising their parental responsibilities.

2.2. Altruistic and commercial surrogacy

In great majority of legal systems that recognize and regulate surrogacy there is a dominant attitude that surrogacy is an altruistic service without the right of surrogate mother to monetary reward or financial gain for providing the service.[15] Furthermore, in most countries that regulate surrogacy the woman who gave birth to a child for another has only right to reasonable expenses.[16] Such legal standard usually involves expenses of *in vitro* fertilisation, expenses concerning carrying out a pregnancy and giving birth to a child, expenses of clothing and transportation into certain medical facility, as well as expenses corresponding with the lost wages of a surrogate mothers as a consequence of her temporary inability to work.[17] This legal formulation is accepted by the draftmakers who *exempli causa* enumerate following expenses as reasonable: lost of wages, the fees for medical services, transportation and placement fees, and the expenses for the nutrition of a surrogate mother.[18] Commercial surrogacy is explicitly forbidden in terms that it is not allowed to include the right to compensation for the service of surrogacy in the agreement made between the intended parent(s) and surrogate mother.[19]

Despite of the fact that commercial surrogacy does not attract much support in comparative law, there can be enumerated legal and practical reasons in favour of this type of surrogacy. Firstly, to determine the reasonable expenses recognised by the legislations that forbid commercial surrogacy means to apply a vague and indefinite legal standard. In that context, the assessment of the expenses which should be considered reasonable does not depend only upon

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fatherless. See: par. 252 (4) Family Law of Serbia – FLS, *Official Gazette of the Republic of Serbia*, No. 18/05.

[15] See: G. Kovaček – Stanić, *op. cit.* (2013), p. 6–9.

[16] For more details see: K. Trimmings and P. Beaumont, *op. cit.*, p. 455.

[17] See: Comparative Study on the Regime of Surrogacy in EU Member States, Directorate General for Internal Policies, *www.europarl.europa.eu/studies*, 15.03.2015, p. 292.

[18] Art. 65. of the Third Book of the Serbian Civil Code Preliminary Draft (2014).

[19] *Ibid*.

types of expenses, but individual characteristics of each and individual surrogate mother as well. In other words, under the disguise of "reasonable expenses", there is a space for the contracting parties to make the agreement about such payment for the expenses that will actually represent financial compensation for the service of surrogacy or monetary reward for a surrogate mother.[20] Thus, it is very difficult to determine the boundaries of fictiveness of the agreement on surrogacy having in mind particularly that intended parents have great interest in the service of surrogacy. The experience of the countries where the services of altruistic surrogacy have been carrying out for many years show how hard is in practice to separate when lucrative character of the surrogacy service ends and when commercial surrogacy begins.[21]

Aversion toward commercial surrogacy often comes from the assessment that this type of surrogacy violates the ethical and moral principles. This could be designated as a selection of morality because surrogacy has been generally considered acceptable, but when it comes to compensation for the service that surrogate mother provides this is regarded as moraly unacceptable. Comparison with the similar medical services such as living organ donation is not possible because the latter medical service requires the condition of medical necessity or existence of imminent life danger for the pacient who could die without the organ transplantation.[22] In that context, the infertile couples have the possibility to adopt the child as an alternative. In other words, in case of intended parents there is not medical necessity, just their intention to have the offspring who is genetically related to them.

Furthermore, the service of surrogacy is often intrepreted in the light of reproductive right to assisted reproduction as a form of medical assistance. However, the physicians who perform such procedure have the right to be paid for their service, so compensation should be also attributed to surrogate mothers.

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[20] For more details see: N. Hatzis, *op. cit.*, p. 421–422.

[21] In the United Kingdom "reasonable expenses" are not defined by the Statute which enables space for the courts to authorise payments made clearly beyond the sum covered with this legal standard, especially addressing to the principle of the best interests of the surrogate born child. See: M. Wells – Greco, National Reports on Surrogacy: The United Kingdom, *International Surrogacy Arrangements: Legal Regulation at the International Level* (eds. K. Trimmings and P. Beaumont), Hart Publishing, Oxford – Portland, 2013, p. 371–372.

[22] See: Art. 41 (2) of the Law on Organ Donation, *Official Gazette of the Republic of Serbia*, No. 72/2009.

It is important to say that surrogate mother could have her own child whose development could be jeopardized if she is not paid for her service.[23]

Finally, surrogate mother can usually be obliged by the surrogacy agreement to lead certain way of life which could increase the possibility for giving birth to a healthy child. Thus, Preliminary Draft of the Serbian Civil Code suggests that surrogacy agreement may involve clauses obligating surrogate mother to lead a healthy life during her pregnancy, to take control of her health on regular basis, to follow the physician's instruction, to retain from alcohol and drug use and smoking.[24] Such contract clauses may be interpreted in accordance with the best interests of the child. However, involving such clauses in surrogacy agreement shows certain level of the intended parents' mistrust in surrogate mother and her capability to perform the contract. As it has been already said, in most countries that regulate surrogacy, surrogate mothers do not have the right to monetary reward or fee for their services. So, the cause of the surrogate mother's obligation should be sought in her humanity and the intention to help the infertile couple to have the off-spring of their own. Then, if lawmakers already advocate altruistic and humanistic nature of surrogacy service, it should be wrong to enable subjecting surrogate mother to obligations that could limit her personal freedom and autonomy. Thus, well-known commodification arguments against commercial surrogacy cannot serve as sufficient instrument to justify purely altruistic approach to surrogacy service. As professor Freeman said: "We cannot stop women exercising their autonomy, nor can we persuade them that being paid aggravates their explotation, when common sense tells them the reverse".[25]

2.3. Family and non-family surrogacy

The Preliminary Draft of the Serbian Civil Code also deals with the issue of family surrogacy. This type of surrogacy means that surrogate mother may be the relative of one of the intended parents in certain degree of kinship on the ground of blood, adoption or marriage. However the issue of family surrogacy has left open even in the latest version of the Preliminary Draft prepared for the public discussion. According to the first proposed solution, it should not allow surrogacy agreement to be made between the parties who can not enter valid

[23] In that context see: N. Hatzis, *op. cit.*, p. 417.

[24] Art. 64 (3) of the Third Book of the Serbian Civil Code Preliminary Draft (2014).

[25] M. Freeman, Does Surrogacy Have a Future After Brazier?, *Medical Law Review,* no. 7/1999, p. 10.

marriage according to the rules of family law.[26] However, the second alternative suggested by the draftmakers is that surrogacy contract can be made between close relatives only in case of gestational surrogacy.[27]

Existence of kinship between surrogate mother and the woman who wants to become a parent using the surrogacy service is closely related to the nature that legislator chose to give to the service of surrogacy. Thus, if possibility of genetic surrogacy would be accepted, the existence of kinship between surrogate mother and sociological or intended parent could hardly be adequate solution. Such legal provision could create great confusion in terms of relationships between family members since kinship does not represent only legal relation, but also biological and sociological relationship. Simultaneously, genetic surrogacy between relatives as contracting parties could remaind of incest in certain way. That is why family surrogacy should be the solution only in the context of gestational surrogate motherhood where surrogate mother does not provide her egg at the same time. On the other hand, family surrogacy has positive aspects because this type of surrogacy service could serve to true goals of altruistic surrogacy in less doubtful way.[28]

Despite of that, some domestic commentators believe that Serbian society has not prepared yet for family surrogacy, since in this society it could be looked upon such type of surrogacy service as moral obligation between close relatives which could disturb kinship relations.[29] Having in mind the importance of kinship in the Serbian social enviroment, allowing family surrogacy would be courageous move. However, if the first solution from the Preliminary Draft was accepted, the

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[26] See: Art. 62. in connection with Art. 20. of the Third Book of the Serbian Civil Code Preliminary Draft. According to the Serbian Family Law: "A marriage cannot be made between relatives by blood in direct line and among the relatives by blood in collateral line, marriage cannot be made between: full siblings, half siblings, uncle and niece, aunt and nephew, the children of full siblings, as well as children of half siblings" (Art. 19. of FLS). Concerning affinity restrictions, marriage cannot be made between relatives by affinity in the first degree of direct line: father-in-law and daughter-in-law, son-in-law and mother-in-law, stepfather and stepdaughter, as well as stepmother and stepson (Art. 21 (1). of FLS).

[27] See: Alternative to Art. 62 of the Serbian Civil Code Preliminary Draft.

[28] See: G. Kovaček – Stanić, *op. cit*. (2013), p. 4. For example, the Court of the First Instance of Korinthos no. 224/2006 authorised the surrogacy agreement where surrogate was the mother of the intended mother, even if she was at the age of 52 at the time of making surrogacy contract. See: *Comparative Study on the Regime of Surrogacy in EU Member States, op. cit.*, p. 288.

[29] For more details see: G. Kovaček – Stanić, *op. cit*., p. 4.

need for commercial surrogacy would be more emphasized. Family surrogacy is allowed in Greek judicial practice and we consider that forbidding commercial surrogacy implies that family surrogacy should be permitted.[30]

3. Participants in the surrogacy process and establishing legal parenthood

3.1. Parties to the surrogacy agreement

Surrogacy is usually regarded in the context of the right to medically assisted reproduction as an expression of reproductive autonomy. However, unlike the right to treatment of infertility by the techniques of assisted reproduction, surrogacy, along with the physician, includes surrogate mother as a person without whom the complete procedure of surrogacy is unthinkable. Figuratively speaking, it is third and final step in making efforts to overcome the infertility problem (besides treatment of infertility and the right to medically assisted reproduction). In terms of medical necessity access to the surrogacy service would imply that it has been previously determined incapability of the intended mother to carry out pregnancy to the term which could be a result of certain anomalies of the uterus, ovary or Fallopian tubes. Thus, reason for surrogacy may be multiple miscarriages or unsuccessful attempts of medically assisted reproduction.[31]

The makers of the Preliminary Draft dedicate little space to the conditions on the woman suitability for the role of surrogate mother. In the Preliminary Draft text they only suggest that surrogacy procedure should be regulated according to the LTIART rules, which is not of help in cases of surrogacy.[32] It is interesting that the makers of Preliminary Draft in certain part of the text suggest who cannot be a surrogate mother, instead of trying to define the suitability conditions for the surrogate mother in positive manner.

Firstly, it is undoubtful that surrogate mother must be a woman of good health and in adequate age for giving birth to a child, fully informed by the physician about all the consequences of providing such service and risks of the procedure.[33]

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[30] See: Comparative Study on the Regime of Surrogacy in EU Member States, *op. cit.*, p. 288.

[31] *Ibid.*, p. 287.

[32] See: Art. 67. of the Third Book of the Serbian Civil Code Preliminary Draft (2014).

[33] Regarding the age of surrogate mother, there are two basic approaches in comparative law which could be named as individual or objective approach. According to the first concept accepted,

In that context it is necesary to perform series of medical tests and to inform in details surrogate mother on the risks of the procedure having in mind that pregnancy means serious change of life.[34] The Preliminary Draft does not suggest that surrogate mother should have previous experience of carring out pregnancy and giving birth to a child. Some of the authors consider that it cannot be spoken about informed consent of the surrogate mother to the surrogacy procedure if she has not had previous experience of pregnancy.[35] This could be understood as a flaw of the makers of Preliminary Draft.

The other party to surrogacy agreement is usually heterosexual marriage couple. However, there is a strong tendency to use the non-discrimination principle in order to extend the scope of persons that could acquire the status of the intended parents in terms of their family or marriage status, as well as their sexual orientation. However, the Serbian legislation on the assisted reproduction requires that principle of medical necessity must be previously fulfilled before commencing the assisted reproduction procedure. That is why involvement of homosexual couple in surrogacy agreement would have implied redefinition of the concept of infertility and embracement of the concept of so-called social infertility.[36]

According to the Preliminary Draft of the Serbian Civil Code surrogacy agreement could primarily be made between spouses or cohabitants out of

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for example, in Greek law suitability age for surrogate mother is determined on individual basis in the context of health condition and risks of pregnancy associated with individual woman. On the other hand, certain legislations, adopt the solution where age limit for the surrogate mother is fixed or, in other words there is upper age limit for giving birth to a child. Thus, in Russian law a woman may be a surrogate mother if she is between 20 and 35 years old. See: *Comparative Study on the Regime of Surrogacy in EU Member States, op. cit.*, p. 288, 335.

[34] For more details see: N. A. Hatzis, *op. cit.*, p. 415.

[35] Israeli commentator Ber considers that it cannot be predicted how surrogate mother would emotionally attach to the child even if she had previous experience of pregnancy and giving birth to the child which makes the concept of informed consent of the surogate mother sensless. See: R. Ber, Ethical Issues in Gestational Surrogacy, *Theoretical Biomedicine and Bioethics,* no. 2/2000, p. 164.

[36] On concept of so-called social infertility see: D. Živojinović, Princip jednakosti i pravo na asistiranu prokreaciju, *Stanovništvo*, br. 1/2012, p. 73. Principle of medical necessity as a precondition for the access to the medically assisted reproduction is involved in LTIART. See: Art. 4. of the LTIART.

wedlock as the intended parents and surrogate mother.[37] The draftmakers suggest that only from the exceptional reasons a single woman should be permitted to make the surrogacy agreement as the intended parent while the assessment of those reasons would be in the court's jurisdiction.[38] Simultaneously, the right of a single woman to make surrogacy agreement as the intended parent is limited to gestational surrogacy.[39]

Perhaps, the makers of the Serbian Civil Code Preliminary Draft should have chosen more restrictive solutions, so that only spouses or cohabitants out of wedlock could be a party to surrogacy agreement as the intended parents. Such proposition may be considered contrary to the principle of non-discrimination, as well as in opposition with the rules of the LTIART and FLS, according to which a single woman has the right to medically assisted reproduction on the particularly reasonable grounds.[40] However, if a single woman was permitted to make the surrogacy agreement as the intended parent, the same right should be attributed to a single man which would greatly widen the scope of persons recognized as the intended parents.[41] Such development could jeopardize the best interests of the child since there is well-known assumption that it is in the child's best interests to have both of the parents willing to cooperate and maintain personal relationship with the child.[42] Thus, it is more acceptable concerning the child's welfare to have both of the parents at time of birth, although the existence of marriage or cohabitance out of wedlock at the moment of child's conception does not necessarily mean that such forms of relationship will last until the birth of a child. However, the existence of marriage or cohabitance out of wedlock represents more solid ground for the assumption that it is in the best interests of the child to grow up with both parents. Those arguments could be disputed arguing that it is better for the child to be born and come into this world even

[37] See: Art. 61 (1) of the Serbian Civil Code Preliminary Draft (2014).

[38] See: Art. 63 (2–3) of the Serbian Civil Code Preliminary Draft (2014).

[39] *Ibid*.

[40] See: Art. 26 (3) of the LTIART and Art. 101 (3) of the FLS.

[41] In that context see: R. Schuz, Surrogacy and PAS in Israeli Supreme Court and the Reports of the Commitee on Children's Right, *The International Survey of Family Law* (ed. A. Bainham), 2004, p. 251.

[42] See: C. Piper, Assumptions about children's best interests, *Journal of Social Welfare and Family Law,* no. 3/2000, p. 262.

with just one known and recognized parent than not to be born at all. That corresponds to truth, but we must be aware that surrogacy deals with the issue of the putative child who has not been conceived yet. So, the welfare of such imaginary child can be assessed and protected only indirectly by the rules of suitability of the intended parents and surrogate mother.[43] Those rules can serve as foundation for future best interests of the child, or to say better, best interests of the future child.

One of the greatest innovation in the text of the Preliminary Draft from 2014 comparing to the previous version of the Serbian Civil Code Preliminary Draft (2011) involves solution on domicile or nationality requirements for the parties to the surrogacy agreement.[44] There is no decisive suggestion in that context, but apparently the change was made in order to avoid the possibility of "reproductive tourism". Having in mind Serbian socio-economic environment, such solution was necessary and it enjoys the strong support in domestic jurisprudence.[45] Similar rule has being applied in Greek law for many years in terms that both women entering the surrogacy agreement (intended mother and a surrogate) must be domiciled in Greece.[46]

3. 2. Acquisition of legal parenthood

As we know, maternity has been established since the ancient times by *mater semper certa est* rule meaning that mother is a woman who gave birth to a child.[47] This legal rule remained unchallenged even in cases of conception of the child

[43] See: K. Trimmings and P. Beaumont, *op. cit.*, p. 539.

[44] See: the third and the fourth alternative for the Art. 62. of the Serbian Civil Code Preliminary Draft (2014).

[45] For more details see: G. Kovaček – Stanić, *op. cit.* (2013), p. 15.

[46] According to the Greek jurisprudence this requirement should be interpreted in terms that contracting parties were living in significant period of time in Greece before making the surrogacy agreement, as well as that they expressed the intention to continue living in this country in the future. *Comparative Study on the Regime of Surrogacy in EU Member States, op. cit.*, p. 289.

[47] This rule was founded by the Roman jurist Paulus who developed the rule from the attitudes of his contemporary Ulpianus meaning that maternity is always certain because the fact of giving birth is always visible, even when the child is conceived out of wedlock. See: D.2.4.5 (Paulus libro quarto ad edictum) and D.2.4.4.3 (Ulpianus libro quinto ad edictum). Cited according to: B. Frier and T. McGinn, *A Casebook of Roman Family Law,* Oxford University Press, New York, 2004, p. 229.

conceived from the donated egg necessary to woman who cannot produce their own reproductive cells since gestational element of motherhood could not come into question. However, when surrogacy practice was rebuilt in the era of assisted reproduction and human rights, concept of motherhood faced further fragmentation since the fact that the acts of carrying and giving birth to a child were excluded from the legal and sociological concept of motherhood. Having in mind that establishing of legal parenthood primarily depends on previously established motherhood, the particular problem of acquisition of legal parenthood in the surrogacy context has emerged.

Professor Bainham argues that: "Nowhere is disparity in power more clearly demonstrated than in the fact of birth and its implications over which, self-evidently, the child concerned has no choice or control".[48] Such is the case with the surrogate born child situated at the epicenter of complex relationships between the intended parents and woman who gave birth to the child. Surrogacy agreement primarily serves to the need of the intended parents and their desire to become genetic parents. Furthermore, the obligation of surrogate mother is always aleatory in some way meaning that it is not possible to predict with certainty what kind of relationship would develop between the surrogate mother and the child during her pregnancy and especially after the child's birth.[49] Simultaneously emotional attachment makes difficult to surrogate mother to hand over the child making her role more demandable. Thus, it is necessary to achieve balance between the interests of the intended parents to be established as legal parents as soon as possible and the possible desire of the surrogate mother to keep the child that may develop over time. The best interests of the child implies establishing the social connection and emotional attachment at the moment of child's birth or if that is not possible at the least amount of time after the fact of birth. However, this interests of the child cannot be accomplished with putting aside the interest of the surrogate mother jeopardizing the right of the child to development in the later phase of childhood.

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[48] A. Bainham, Arguments about Parentage, *Cambridge Law Journal,* no. 2/2008, p. 324.

[49] Some research indicates that in most cases emotional attachment of the surrogate mother with the child increases as pregnancy goes on. For more detail see: R. Cook, Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation, *What is a Parent? A Socio-Legal Analysis* (eds. A. Bainham, S. Day Sclater, S. Richrads), Hart Publishing, Oxford – Portland, p. 133.

Analyzing comparative law solutions, there can be noticed two general approaches or models to acquisition of legal parenthood regarding the surrogate born child which could be designated as pre-approval and post-approval systems. Here, it must be stressed that some legislations, such as Israeli law, have *sui generis* models of acquisition of legal parenthood that cannot easily be fit into this classification having the elements of both legal approaches.[50]

Firstly, legal parenthood of the intended parents could be established at the moment of pre-approval of the surrogacy agreement given by the court or administrative authority. In other words, ground for registration of the intended parents as the child's legal parents in the birth records is the surrogacy agreement while the relevant authorisation of the agreement is the formal requirement for the validity of the surrogacy contract. Only after the pre-approval is given it may be accessed to the surrogacy procedure and assisted reproduction in terms of surrogacy. Thus, surrogate mother does not have the right to change her mind after giving birth to a child and she is not permitted to keep the child. Typical example of such system can be found in Greek law.[51]

On the other hand, in certain countries, for example the United Kingdom, surrogate mother cannot renounce her parental right towards the child in the surrogacy agreement, but there must be intervention of the court in order to establish legal parenthood in favour of the intended parents.[52] Thus, the famous *mater semper certa est* principle is not derogated by the rules on surrogacy in those legal systems. Accordingly, the intended mother cannot claim parental order of the court for transfer of legal parenthood until the period of six weeks from the child's birth lapses, which is the amount of time that corresponds with the right

[50] Israeli law includes pre-aproval of the surrogacy agreement given by the State-appointed Committee, composed of seven members of various professions (two physicians specialising in gynaecology and obstetrics, a physician specialised in internal medicine, a clinical psychologist, a social worker, a jurist and a person of the clergy of the parties' religion). However, the intended parents do not aquire the status of child's legal parents at the time of child's birth. They must initiate the proceedings for parenthood order within seven days of child's birth. During that period key role belongs to the specially appointed welfare agent as a temporary guardian of the child. This welfare agent could also demonstrate that surrogate mother has changed her mind about keeping the child influencing greatly to the decision of the court. For more details on Israeli law on surrogacy see: S. Shakargy, *op. cit*., p. 233–234.

[51] See: K. Rokas, *op. cit.*, p. 148.

[52] See: J. Herring, *op. cit.*, p. 351.

of the surrogate mother to change her mind and keep the child.[53] This is called cooling-off period in the United Kingdom legal literature.[54] Thus, until the court procedure for transfer of parental rights is not finished, surrogate mother must be registered in child's birth records as the mother of the child.[55] Unlike the Greek system of acquisition of legal parenthood in the context of surrogacy, the United Kingdom law is more concerned about legal status and vulnerability of surrogate mother which makes more nuanced approach to the surrogate mother's needs, but on the other side less efficient to achieve the true aims of surrogacy.

The Preliminary Draft of the Serbian Civil Code in its earlier version from the year 2011 suggests that surrogacy agreement should be the ground for registration of the intended parents as the child's legal parents in the birth records.[56] However, it was given very weak agreement control mechanism insisting only on judge or notary confirmation of the surrogacy agreement as a formal requirement for the validity of the agreement.[57] The adoption of such solution would actually means some sort of privatisation of surrogacy process which can hardly be accepted since surrogacy does not concern only parties to the agreement, but above all the child who should be conceived and bring to this world.

Unfortunatelly, instead of empowering the control mechanism of the surrogacy procedure through the system of court pre-aproval of the agreement, as it is in Greek law, the Preliminary Draft text from 2014 has widened the gap adding the alternative that surrogate mother should give her consent to acquisition of legal parenthood by the intended parents after the child's birth which meaning that surrogate mother could have the change of heart about relinquishing her parental rights.[58] Such solution would bring elements of post-approval system for establishing legal parenthood demanding decision of the court on transfer of

[53] See: R. D'Alton-Harrison, Mater Semper Certa Est: Who's Your Mummy?, *Medical Law Review,* no. 3/2014, p. 368.

[54] *Ibid*.

[55] *Ibid*., p. 368–369.

[56] See: Art. 60. of the Third Book of the Serbian Civil Code Preliminary Draft (2011).

[57] See: Art. 61 (3) of the Third Book of the Serbian Civil Code Preliminary Draft (2011).

[58] See alternative to the Art. 60 of the Third Book of the Serbian Civil Code Preliminary Draft (2014).

parental rights. This development proves that Serbian draftmakers are far from any clear-cut solution regarding this highly important issue.

4. Conclusion

The makers of the Preliminary Draft of Serbian Civil Code announced major changes in family legislation of Serbia. One of the far-reaching solutions that has been suggested is setting the legal frame for the service of surrogacy as a particular expression of the reproductive autonomy and the right to medically assisted reproduction. The agreement which involves clauses under which a woman would carry out pregnancy and give birth to a child for other persons (intended or commissioning parents) would for sure provoke tectonic changes in our society and legal system. Unfortunatelly, some of the key issues about surrogacy have left unsolved and undecided even in the latest version of the Preliminary Draft of Serbian Civil Code from 2014, such as the legal nature or character of surrogacy service and the affiliation procedure concerning the intended parents. Simultaneously, the Preliminary Draft has preserved quite weak mechanism of surrogacy procedure control which is not encouraging. The progress has been made by proposing the solution where the domestic citizenship or domicile will be necessary conditions for making the agreement on surrogacy which is higly important in order to avoid the possibility of "reproductive tourism" especially in the light of our social and economic circumstances.

In this paper, the author came to the following concrete conclusions:

1) Surrogacy procedure should be restricted to gestational surrogacy only;
2) Contract clauses on payment for the service of surrogacy should be allowed as a part of surrogacy agreement (commercial surrogacy) and it should also be given the criteria for the determination of minimal amount of payment to surrogate mother;
3) The possibility of making contract should be given only to spouses and cohabitants out of wedlock as the intended parents;
4) Gestational family surrogacy is necessary in case of forbidding commercial surrogacy;
5) The solution should be adopted that only woman who had previous experience in carrying out pregnancy and giving birth to a child could be designated as a surrogate mother;

6) Court or notary confirmation of surrogacy agreement is not sufficient mechanism of surrogacy procedure control and the system of judicial pre-approval should be introduced like in the Greek law;

7) Consent of the surrogate mother as a condition for the registration of intended parents as the legal parents of the child in the birth records collides with the rules where the legal relationship between child and the intended parents is established by the surrogacy agreement demanding so-called cooling off period for a surrogate mother;

8) Referring to the Law on Treatment of Infertility by the Procedures of Assisted Reproductive Technology is not always in accordance with the surrogacy procedure, so there should be special rules on the procedure of surrogacy;

9) Requirements for domestic citizenship and domicile for both contracting parties to surrogacy agreement are necessary and good step forward of the makers of the Preliminary Draft.